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No. 82-1788

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALABAMA POWER COMPANY, *Petitioner*,

v.

NUCLEAR REGULATORY COMMISSION
and THE UNITED STATES OF AMERICA, *Respondents*.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

HERBERT DYM
ROBERT M. SUSSMAN
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

J. A. BOUKNIGHT, JR.*
HAROLD F. REIS
HOLLY N. LINDEMAN
LOWENSTEIN, NEWMAN, REIS & AXELRAD
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-8400

*Counsel of Record

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This amicus brief is submitted by the Edison Electric Institute[1] ("EEI") in support of the petition for certiorari filed by Alabama Power Company ("APCO") seeking review of the decision of the Court of Appeals for the Eleventh Circuit in *Alabama Power Co.* v. *Nuclear Regulatory Commission*, 692 F.2d 1362 (11th Cir. 1982). The decision involves the Nuclear Regulatory Commission's implementation of the prelicensing antitrust review pro-

[1] In accordance with Rule 36 of this Court, EEI has received and filed with the Court the written consents of counsel for each of the parties to appear as amicus curiae in this proceeding.

visions of Section 105c of the Atomic Energy Act of 1954, as amended. 42 U.S.C. § 2135(c) (1976).[2]

INTEREST OF THE EDISON ELECTRIC INSTITUTE

EEI is the national association of investor-owned utility companies in the United States. Its membership serves 99.6% of all customers of the investor-owned segment of the industry and 77% of the nation's electricity users. Approximately 70 nuclear power reactors owned by EEI members are now licensed to operate in the United States, and 48 additional plants are under construction by EEI members. EEI believes that it is essential that nuclear power continue to be a viable and major energy alternative.[3]

In the recent past, however, the development of nuclear energy has been hampered by a number of factors,

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[2] The Nuclear Regulatory Commission succeeded to the Atomic Energy Commission's responsibilities in 1974. Energy Reorganization Act of 1974, 42 U.S.C. § 5801 *et seq.* (1976). As used in this brief, the term "Commission" will refer to either the NRC or the AEC.

[3] EEI is not alone in this conviction. As this Court has very recently observed:

> There is little doubt that a primary purpose of the Atomic Energy Act was, and continues to be, the promotion of nuclear power. The Act itself states that it is a program "to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public." 42 U.S.C. § 2013(b). . . . It is true, of course, that Congress has sought to simultaneously promote the development of alternative energy sources, but we do not view these steps as an indication that Congress has retreated from its oft-expressed commitment to further development of nuclear power for electricity generation.

Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n., No. 81-1945, slip. op. at 28-29 (U.S. April 20, 1983).

including regulatory and economic uncertainties.[4] The decision below contributes significantly to the uncertainties. Under the prelicensing scheme of the Atomic Energy Act, utilities that seek licenses to operate nuclear plants can be subjected to far-reaching economic restrictions if the NRC believes that their activities under the license will create or maintain a "situation inconsistent with the antitrust laws." The decision below would allow the NRC unfettered discretion in imposing such restrictions. Under the decision, the NRC could conduct an "antitrust" review that is not governed by any discernible principles of antitrust law and is not subject to meaningful judicial review. Moreover, the NRC would be free to examine, and impose restrictions on, aspects of an applicant's operations totally unrelated to the competitive impact of the nuclear plant for which a license is sought. As a result of the decision below, therefore, any future applicant for a construction license will be exposed to significant financial risk. The inevitable consequence will be the creation of additional, artificial barriers to the choice of nuclear energy for electrical generation.

An applicant for an NRC construction license is under considerable financial pressure to acquiesce in license conditions sought by the NRC's staff rather than face an

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[4] *See* Nuclear Energy Policy, Statement Announcing a Series of Policy Initiatives, 17 Week Comp. Pres. Doc. 1101-02 (October 8, 1981): "Nuclear power has become entangled in a morass of regulations that do not enhance safety but that do cause extensive licensing delays and economic uncertainty." In response to this, as well as similar observations, the NRC Regulatory Reform Task Force has recently proposed, among other legislative and administrative improvements, the Nuclear Licensing Reform Act of 1983, which seeks to eliminate certain unwarranted licensing delays. S. 893, 98th Cong., 1st Sess. (1983). This proposal would not affect antitrust review proceedings.

antitrust hearing before the agency.[5] As a result, this is the first case under Section 105c to reach the courts, even though Section 105c was enacted in its present form in 1970 and the NRC has invoked it to impose license conditions upon dozens of electric utilities.[6] In the future, this Court will have few opportunities to correct the errors of the court below and the NRC. If the Court declines to grant review now, utilities considering the nuclear option will face a choice between exposing all their business activities to a boundless administrative review which may result in onerous and far-reaching restrictions or, as is more likely, avoiding the Commission's jurisdiction by rejecting the use of nuclear generation.

SUMMARY OF ARGUMENT

The court below declined to review the NRC's antitrust analysis on the ground that Section 105c neither "calls for or allows a traditional antitrust analysis" and "[settled

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[5] The NRC requires that any such antitrust hearing be completed before the construction license may issue. Louisiana Power & Light Co. (Waterford Steam Electric Generating Station, Unit 3), CLI-73-25, 6 AEC 619, 621-22 (1973). Although the NRC will issue the construction license after an initial decision has been issued by one of its Atomic Safety and Licensing Boards, the licensee must accept the license weighted with whatever conditions are specified in the initial decision, unless the NRC stays effectiveness of the conditions pending appellate review. The NRC has consistently declined to grant such stays. Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-385, 5 NRC 621 (1977); Alabama Power Co. (Joseph M. Farley Nuclear Plant Units 1 and 2), CLI-81-27, 14 NRC 795 (1981).

[6] APCO was able to see the process through to its conclusion because its license is subject to a "grandfather" clause in the 1970 legislation, which permits construction to proceed in parallel with antitrust proceedings in the case of a small number of applications which were submitted before 1971. *See* 42 U.S.C. § 2135(c)(8).

antitrust] principles simply do not apply in the usual way to nuclear power regulation." 692 F.2d at 1368, 1369. These holdings are inconsistent with the plain language of the statute, the legislative intent and the Commission's own interpretation of Section 105c. Their effect is to empower the NRC to impose its own views of antitrust policy upon license applicants without observing ascertainable principles of antitrust law on which applicants can rely to base their conduct and courts can rely to review the Commission's decisions. In the case at hand, the approach of the lower court led it to affirm the NRC's decision without even considering substantial arguments that the NRC's views of antitrust policy are inconsistent with basic antitrust policies adopted by the federal courts and the Federal Trade Commission.

In addition, the court below erroneously authorized the Commission to conduct an antitrust review of, and impose conditions on, phases of the applicant's business not reasonably related to "activities under the license." This holding is in conflict with the express language of Section 105c. Contrary to the legislative intent, it would permit the NRC to regulate not merely the use to which the nuclear facility is put but also other business activities of the applicant entirely unrelated to the license sought.

The effect of the lower court's erroneous holdings is to confer sweeping and essentially unreviewable power on the NRC to intervene in the business activities of nuclear license applicants based on its own notions of antitrust policy. The important questions presented in APCO's petition should be settled by this Court because the decision below will significantly reduce the incentives for private investment in nuclear power and because few cases will arise in the future in which the errors in the lower court's decision can be corrected.

ARGUMENT

I.

The Court Of Appeals Erred In Holding That Settled Antitrust Principles Do Not Apply In The Usual Way Under Section 105c Of The Atomic Energy Act.

Section 105c of the Atomic Energy Act provides that, after a hearing is held in connection with a license application for a nuclear facility, the NRC must "make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws."[7] In this case, APCO contended before the Eleventh Circuit that the NRC's finding of a "situation inconsistent" was erroneous because the NRC misapplied the antitrust laws, and their underlying policies, in significant respects. However, the Eleventh Circuit concluded that it need not address

> the contention of Alabama Power that the NRC has 'misapplied settled antitrust principles'. . . . Those principles simply do not apply in the usual way to nuclear power regulation.[8]

This holding basically permits the NRC to ignore settled antitrust principles and to avoid any meaningful judicial review.

A. The Statutory Language and Legislative History Demonstrate That the NRC Is to Apply Traditional Antitrust Standards

In enacting Section 105c, Congress did not fashion specific criteria for determining when the activities of a license applicant could be considered anticompetitive.

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[7] 42 U.S.C. § 2135(c)(5).

[8] 692 F.2d at 1369.

Instead, Congress directed the NRC to identify any "situations inconsistent with the antitrust laws" and enumerated the antitrust statutes that the NRC was expected to apply. Congress' reference to existing antitrust statutes and its refusal to prescribe special antitrust principles for nuclear facilities demonstrate that it expected the NRC to apply established antitrust principles on a case-by-case basis.

The NRC has in fact recognized its obligation to apply antitrust doctrines developed under the Sherman, Clayton and Federal Trade Commission Acts.[9] According to the NRC's Appeal Board, the central issue under Section 105c is whether the applicant's activities would create or maintain a situation that is inconsistent with the " 'policies clearly underlying' the antitrust laws."[10] Although the Appeal Board has stated that this standard does not necessarily require a finding that an actual violation of the antitrust laws has occurred, the Commission itself recognizes that it has no independent authority to

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[9] Nor did the government argue otherwise below. Its brief in the court of appeals expressly stated that "Congress intended the Commission to engage in normal antitrust analysis in enforcing Section 105c." Brief of Respondents at 22, Alabama Power Co. v. NRC. The brief in fact defended the proceedings before the Commission by contending that it had engaged in such "normal antitrust analysis" and never suggested to the court that antitrust principles do not apply in the usual way to nuclear power regulation. Consequently, the Eleventh Circuit erred in upholding the NRC decision on grounds other than those invoked by the agency. *See* SEC v. Chenery Corp., 332 U.S. 194 (1947). *See also* FTC v. Sperry and Hutchinson Co., 405 U.S. 233 (1972).

[10] Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-560, 10 NRC 265, 273 (1979) (footnote omitted) (quoting Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-452, 6 NRC 892, 907-09 and authorities there cited).

declare antitrust policy, but is bound by antitrust principles established by the courts: "[I]n the field of antitrust, our expertise is not unique. We merely apply principles, developed by the Antitrust Division, the Federal Trade Commission, and the Federal courts, to a particular industry." *Houston Lighting & Power Co.* (South Texas Project, Units 1 & 2), CLI-77-13, 5 NRC 1303, 1316 (1977).

Indeed, any other approach would be irrational. It would be counterproductive if conduct approved by the courts and the FTC as compatible with the antitrust laws could be condemned by the NRC merely because it is reviewed in connection with the licensing of a nuclear facility. Such a course would allow the NRC—an agency without antitrust expertise—to fashion rules of conduct at odds with national antitrust policy as declared by the courts. If Congress had intended to assign the NRC such novel and far-reaching responsibilities, it hardly would have utilized statutory language that directed the NRC to apply existing "antitrust laws" and failed to provide any additional guidance.

The legislative record confirms that, while prelicensing antitrust review was viewed as a vehicle for curing incipient antitrust violations that might come to fruition after a nuclear plant was in operation, Congress fully expected the Commission to perform this function by applying established antitrust policies. As explained in the Joint Committee Report on the amendments which adopted the present language of Section 105:

> The legislation proposed by the committee provides for a finding by the Commission "as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a." The concept of certain-

> ty of contravention of the antitrust laws or the policies clearly underlying these laws is not intended to be implicit in this standard; nor is mere possibility of inconsistency. *It is intended that the finding be based on* reasonable probability of *contravention of the antitrust laws or the policies clearly underlying these laws.* It is intended that, in effect, the Commission will conclude whether, in its judgment, it is reasonably probable that the activities under the license would, when the license is issued or thereafter, *be inconsistent with any of the antitrust laws or the policies clearly underlying these laws.*[11]

The Committee hearings also make it clear that the legislation was not intended "to subject utilities which use nuclear power to a more stringent substantive antitrust standard of violation of the law than that applicable to other utilities."[12] Joseph F. Hennessey, AEC General Counsel, agreed:

> that a small cooperative or municipality that wanted to participate in a large nuclear plant would have to establish that not on the basis of the Government

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[11] H.R. Rep. No. 1470, 91st Cong., 2d Sess. 14, *reprinted in* 1970 U.S. Code Cong. & Ad. News 4981 (emphasis supplied) (Report of the Joint Committee on Atomic Energy on Amending the Atomic Energy Act of 1954 to Provide for Prelicensing Antitrust Review of Production and Utilization Facilities) (hereinafter cited as *Joint Committee Report*).

As is described below, at pp. 11-13, this case cannot logically turn on any difference in the degree of proof required under Section 105c as compared with the antitrust statutes applied by the courts and the FTC. The issues presented to the Eleventh Circuit concern conduct that, in APCO's and EEI's view, would be *approved* by the courts or the FTC as fully consistent with antitrust policy.

[12] Prelicensing Antitrust Review of Nuclear Power Plants: Hearings Before the Joint Committee on Atomic Energy, Part I, 91st Cong., 2d Sess. 143 (1970) (Statement of Assistant Attorney General Richard W. McLaren in charge of the Antitrust Division) (hereinafter cited as *Hearings*).

> contribution to the development of this new source of electricity, but on the basis of the antitrust laws which apply generally.[13]

This testimony is reinforced by the preceding statutory history. In 1968 Congress considered, but rejected, a bill which would have obligated utilities to share the ownership of their nuclear facilities in circumstances where antitrust law or policy would not have justified such a result.[14] Two years later, when Congress finally did amend Section 105c, the licensing standards included in the unsuccessful bill were absent. This omission was hardly inadvertent. As the Assistant Attorney General for Antitrust pointed out during the hearings on the 1970 amendments:

> The legislation now before the Joint Committee is of considerably narrower scope [than Kennedy-Aiken]. It enacts no new substantive criteria but would merely have the Commission apply the provision for antitrust review [at an early stage in the licensing process].[15]

In other words, Congress expressly rejected the proposition that nuclear facilities were to be judged against special antitrust principles that did not apply to

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[13] *Hearings*, at 77.

[14] S. 2564, 90th Cong., 1st Sess. (1967) (introduced by Senators Aiken and Kennedy and referred to the Joint Committee on Atomic Energy on October 23, 1967).

[15] *Hearings*, at 148 (Statement of Mr. McLaren). *See also Joint Committee Report*, at 15. "The Committee did not deem it advisable to extend the boundaries of the considerations to be taken into account by the Commission beyond the antitrust laws and the policies clearly underlying those laws."

other businesses. Yet the decision below grants the NRC precisely the authority that Congress chose to withhold.

B. The Antitrust Issues That The Court Of Appeals Declined To Reach Demonstrate A Serious Conflict Between The NRC's View Of Antitrust Policy And Interpretation Of These Policies By The Courts

Having held that the statute neither "calls for or allows a traditional antitrust analysis," the court below summarily rejected APCO's arguments that the NRC had ignored established antitrust principles in evaluating its conduct. The court's unwillingness to examine the NRC's antitrust analysis in light of settled antitrust principles was not merely a technical default. As APCO demonstrated in the court of appeals, the NRC's decision both ignored basic tenets of antitrust law and applied established antitrust doctrines in a demonstrably incorrect manner.

The following examples illustrate the serious antitrust issues that were raised by APCO but disregarded by the Eleventh Circuit:

1. The NRC held that APCO's unwillingness to share its nuclear units with other firms constituted a violation of Section 2 of the Sherman Act. The unmistakable rationale of the NRC's decision is that it is improper for a large firm to utilize nuclear power in order to enhance its competitive position. The federal courts, however, have firmly adopted the principle that a dominant firm, motivated by legitimate business considerations, may compete for available business as skillfully and effectively as it can, utilizing any economies of scale available. As the Second Circuit has concluded,[16] it would be contrary to the pur-

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[16] Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

pose of the Sherman Act to "deprive the leading firm in an industry of the incentive to exert its best efforts . . . [and thus to] compel the very sloth they [the antitrust laws] were intended to prevent."[17]

2. APCO offered extensive evidence that many of the practices condemned by the NRC were conducted in response to obligations imposed by federal and state regulation. The NRC found that, since APCO had not established that regulation of its activities entitled it to immunity from antitrust scrutiny, this evidence did not merit serious consideration.[18] This conclusion conflicts with recent decisions by three Circuits which have held that regulatory requirements must be taken into account in determining both whether a regulated firm enjoys monopoly power and, if so, whether such power has been abused.[19] Yet the Eleventh Circuit declined to review (or

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[17] This principle has been applied to nuclear power plants. As one federal court has recognized, a utility's decision to construct and operate, on its own, a large, efficient nuclear plant does not constitute a violation of Section 2 of the Sherman Act. Where there is no proof that defendant acquired or maintained its nuclear facilities through other than business acumen, "[f]airness and the law dictate that defendant should be able to reap what it has sown." Florida Cities v. Florida Power & Light Co., 525 F. Supp. 1000, 1007 (S.D. Fla. 1981). *See also* California Computer Products, Inc. v. International Business Machines Corp., 613 F.2d 727 (9th Cir. 1979); Foremost Pro Color, Inc. v. Eastman Kodak Co., No. 80-5629 (9th Cir. Feb. 23, 1983); In re E.I. DuPont deNemours & Co., 96 F.T.C. 653 (1980).

[18] Alabama Power Co., (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-646, 13 NRC 1027, 1040 (1981).

[19] See Phonetele, Inc. v. AT&T, 664 F.2d 716 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 785 (1983); Mid-Texas Communications Systems v. AT&T, 615 F.2d 1372 (5th Cir. 1980), *cert. denied sub nom.* Woodlands Telecommunications Corp. v. Southwestern Bell Telephone Co., 449 U.S. 912 (1980); MCI Communications Corp. v. AT&T, 44 Antitrust and Trade Reg. Rep. (BNA) 112 (7th Cir., Jan. 12, 1983).

even mention) this departure from the antitrust principles articulated by the federal courts.

3. The NRC found that APCO's reductions of its wholesale rates, but within profitable margins, was anticompetitive since the utility's purpose was to retain its customer base.[20] This view collides with decisions of the federal courts which emphasize that "a major objective of the antitrust laws" is to promote price competition, by large as well as small firms.[21]

The Eleventh Circuit wholly failed to reach the merits of these arguments on the basis that Section 105c envisions a "wider scheme" than the "traditional antitrust enforcement scheme."[22] As we have demonstrated above, that view is inconsistent with the language of Section 105c and its legislative history. Nor can the Eleventh Circuit's reasoning be supported on the theory that the court was merely affirming the NRC's authority to proscribe incipient anticompetitive conduct that, if carried to fruition, was likely to contravene antitrust law or policy.[23] If the court believed that normal principles of antitrust policy were relevant, it would have at least examined APCO's arguments to determine whether incipient antitrust violations existed or were probable, instead of dismissing those arguments on the ground that normal anti-

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[20] *Alabama Power Co.*, 13 NRC at 1078.

[21] MCI Communications Corp. v. AT&T, 44 Antitrust and Trade Reg. Rep. (BNA) at 131. *See also* William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 58 (1982); Southern Pacific Communications Co. v. AT&T, 556 F. Supp. 825 (D.D.C. 1983).

[22] 692 F.2d at 1368.

[23] On the contrary, the court below stated that the NRC may condition "licenses in anticipation of situations which would not, if left to fruition, in fact violate any antitrust law." 692 F.2d at 1368.

trust "principles simply do not apply in the usual way to nuclear power regulation." 692 F.2d at 1369.

The antitrust issues raised by APCO were not merely technical in nature. As is evident from the foregoing, APCO charged the NRC with a significant misunderstanding and misapplication of antitrust policy. The Eleventh Circuit's failure to review the NRC's decisions in light of established antitrust policies may therefore have a serious chilling effect on efforts to improve efficiency in the electric utility industry by discouraging utilities from assuming the considerable financial risk associated with nuclear generation. Review by this Court is needed to establish that electric utilities subject to the NRC's licensing scheme will be judged by the same antitrust principles as other businesses and to assure that meaningful judicial review will be available if the NRC misapplies basic antitrust policies established by the courts.

II.

The Court Below Erred By Approving The Commission's Essentially Unlimited Review Of APCO's Activities And the Resulting Imposition Of Remedies Not Reasonably Related to Activities Under the License

APCO argued below that the Commission had erroneously applied Section 105c by ignoring the necessity for a "nexus" between any "situation inconsistent with the antitrust laws" and the operation of APCO's nuclear plants and by imposing licensing conditions on APCO that were unrelated to the generation and use of nuclear power. The court below ignored this argument, holding simply that "[t]he statute clearly calls for a broad inquiry and common sense does not allow interpretations to the contrary." 692 F.2d at 1368.

Section 105c speaks only to "activities under [a] license" which has not yet been issued and only to the likelihood that those activities would create or maintain a situation inconsistent with the antitrust laws. The Commission is thus not authorized to punish an applicant for past misconduct, as a court would be in an action brought for damages. Instead, the applicant's history is relevant only insofar as it establishes a reasonable probability that the activities of the licensee "would, when the license is issued or thereafter, be inconsistent with any of the antitrust laws or the policies clearly underlying these laws."[24] Nor does the Commission possess plenary authority to remedy any and all anticompetitive conduct that the applicant may have engaged in. The wording of Section 105c demonstrates that the Commission can impose antitrust relief only if the anticompetitive "situation" it has found will be maintained by "activities under the license."

The limited scope of Section 105c is confirmed by the nature of the Commission's regulatory responsibilities. As the Commission has itself recognized in another proceeding:

> [i]f Congress had intended to enact a broad remedy against all anticompetitive practices throughout the electric utility industry, it would have been anomalous to assign review responsibility to the Atomic Energy Commission, whose regulatory jurisdiction is limited to nuclear facilities.[25]

The Commission has noted that it does not possess unique expertise in the field of antitrust, but merely applies

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[24] *Joint Committee Report*, at 15.

[25] Louisiana Power & Light Co. (Waterford Steam Electric Generating Station, Unit 3), CLI-73-25, 6 AEC 619, 620 (1973).

"principles, developed by the Antitrust Division, the Federal Trade Commission, and the Federal courts, to a particular industry."[26] This conclusion is amply supported by the statutory history. The basic thread running through the testimony on Section 105c is that prelicensing antitrust review was to be predominantly concerned with "the contractual arrangements and other factors governing how the proposed plant would be owned and its output used."[27]

Nevertheless, in this case, the NRC completely ignored any requirement of a nexus between the antitrust allegations before it and the "activities under the license." All but one of the practices of APCO that the Commission condemned as anticompetitive had been terminated at the time of the NRC hearings.[28] Moreover, these concluded practices had no direct or indirect connection with the operation of APCO's nuclear units or even with APCO's current relationship with its actual or potential competition. In fact, the NRC did not attempt to establish such a relationship. Rather, the NRC simply enumerated *past* practices that it deemed inconsistent with the antitrust laws and *assumed* that they justified prospec-

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[26] Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), CLI-77-13, 5 NRC 1303, 1316 (1977).

[27] Prelicensing Antitrust Review of Nuclear Power Plants: Hearings Before the Joint Committee on Atomic Energy, Part II, 91st Cong., 2d Sess., 366 (statement of Mr. Comegys).

[28] The single exception to this is the NRC's finding that APCO's refusal voluntarily to share ownership of the Farley Plant with its competitors was a violation of the antitrust laws. The government conceded before the court below that such a "refusal to provide ownership access is not, in itself, an antitrust violation." Brief of Respondents at 53, Alabama Power Co. v. NRC. As is noted above, at p. 11, however, the court gave no consideration to this issue.

tive antitrust relief. The nexus requirement was thus read out of the statute.[29]

The court of appeals justified the NRC's failure to show a nexus with the statement that

> The amount of market power held by the applicant and the ways it has been used are relevant inquiries in determining whether there is a 'situation' to maintain, and whether issuing this license will maintain it.[30]

This observation does not address the central deficiency in the NRC's analysis. There is no dispute about the NRC's right to consider a utility's market power or its past conduct in determining whether the licensed facility will maintain an anticompetitive situation. However, APCO's objection, not addressed by the court below, related to the failure of the NRC to *connect* past conduct with the competitive impact of the activities to be conducted in the future under the NRC license. In the absence of such a connection, the NRC would be at liberty to impose unlimited corrective conditions on its licensees, without any showing that the present competitive situation will be affected by licensing of the nuclear facility.[31]

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[29] The Appeal Board appeared to suggest a character test rather than a nexus text, stating: "Here, as elsewhere, the past is prologue. Past conduct, good or bad, often indicates what future conduct might be." *Alabama Power Co.*, 13 NRC at 1044.

[30] 692 F.2d at 1368.

[31] In APCO's case, the Appeal Board ordered the utility to provide general transmission services for a group of municipal utilities which, it conceded, had never been wronged by the applicant and would not be harmed by the grant of an unconditional license. *Alabama Power Co.*, 13 NRC at 1110.

In consequence, a utility seeking a construction permit would expose all aspects of its operations to a broad review which does not even apply normal antitrust principles. Such a result was clearly never intended by Congress, which viewed Section 105c as a narrow grant of authority tailored to the NRC's limited antitrust responsibilities.

CONCLUSION

The court below has read out of Section 105c the requirement that the NRC apply settled antitrust principles to the prelicensing antitrust review required by this provision. The court has also eliminated the requirement that such review be limited to "activities under the license." In consequence, the court has left the Commission without any standard to guide its administration of Section 105c and supplied no principles with which judicial review may be conducted. Moreover, the court has authorized the NRC to expose the entire business of a license applicant to antitrust scrutiny and the possible imposition of burdensome license conditions.

The decision below represents a clear misinterpretation of an important national statute. It cannot fail to discourage the choice of nuclear energy as a method of electrical generation. We therefore submit that this case is of sufficient national importance to justify grant of the writ.

Respectfully submitted,

J. A. BOUKNIGHT, JR.
HAROLD F. REIS
HOLLY N. LINDEMAN
LOWENSTEIN, NEWMAN,
REIS & AXELRAD
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

HERBERT DYM
ROBERT M. SUSSMAN
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044